



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

JULY 6, 2000

OFFICE OF
ENVIRONMENTAL INFORMATION

Mr. John Dwyer, President
Lignite Energy Council
1016 E. Owens Avenue
P.O. Box 2277
Bismarck, ND 58502

Dear Mr. Dwyer:

This letter responds to your May 11, 2000, letter requesting guidance on the reporting requirements of section 313 of the Emergency Planning and Community Right-to-Know Act (EPCRA), commonly known as the Toxic Release Inventory (TRI). Specifically, you asked for reconsideration of the guidance EPA provided in a June 9, 1999, letter to Mr. Joseph D. Friedlander, Environmental Manager for the Freedom Mine located in Beulah, North Dakota.

Based on your letter, and the original April 27, 1999, letter from Freedom Mine to EPA, we understand that these are the facts. The Freedom Mine is leasing reclaimed mining facility lands to private individuals to grow crops. The Freedom Mine states that it bears no expense and makes no profit as a result of the private farmers' activities. Freedom Mine states the rental rates generally cover only property taxes. The farmers apply pesticides and fertilizers on the reclaimed lands. The farmers, and not the facility, choose and purchase the chemicals that are applied to the land. Additionally, with regard to the chemicals being used, Freedom Mine states that the farmers are directly responsible for proper licensing, training, application, storage, waste disposal, maintenance, and record keeping.

The original letter from Freedom Mine stated that the reclaimed land is part of the mining facility. In your letter you state "the only reason that these lands remain part of the facility is because the Federal Surface Mining Control and Reclamation Act requires that reclaimed lands remain in a permit area, under surface mining bond, for at least ten years after initial seeding following reclamation (five years for lands receiving more than 26 inches of precipitation annually)." We also understand from the original Freedom Mine letter and a telephone conversation with Mr. Joseph Friedlander on June 28, 2000, that in order for Freedom Mine to be released from its bond obligations, the farming of the reclaimed land must be productive.

In its April 1999 letter Freedom Mine requested an exemption so that it did not have to report any section 313 chemicals being used by the farmers to whom it is leasing reclaimed mine property. In our June 1999 response, EPA indicated that, given the facts, Freedom Mine should report those Section 313 chemicals being used by the farmer. Your current letter requests that EPA reconsider this guidance. We understand your concerns and have carefully reviewed our previous guidance in this case regarding TRI reporting.

Facilities that conduct only agricultural activities not explicitly covered in a Standard Industrial Classification (SIC) code subject to EPCRA section 313 are not subject to the TRI reporting requirements. Agriculture is not within one of the covered SIC codes subject to TRI reporting. However, if a facility in a covered SIC code meets the other reporting criteria, then **all** activities taking place at the facility, even those activities, such as agricultural activities like farming, that are associated with non-covered SIC codes, are subject to TRI reporting requirements, unless there is an applicable exemption.

Let me explain how the TRI Program works and its likely impact on the Freedom Mine as it relates to the leased property. The core principal set forth in EPCRA and its implementing regulations is that facilities must report for certain listed toxic chemicals if they meet certain threshold tests. The first threshold test concerns whether the primary economic activity at the facility is within one of the covered industries (designated by Standard Industrial Classification (SIC) codes). In this case, the primary SIC code for the Freedom Mine facility is a covered SIC code. This means that all operations at the Freedom Mine facility must be considered, including the farming operations, in evaluating whether it exceeds any of the chemical activity thresholds, unless there is an explicit exemption that would apply.

In our June 1999 response to Freedom Mine, we evaluated the possibility that the exemption for certain owners of leased property, *40 CFR 372.38(e)*, might apply. The exemption in Section 372.38(e) reads, in pertinent part, as follows:

Certain owners of leased property. The owner of a covered facility is not subject to reporting under section 372.30 if such owner's only interest in the facility is ownership of the real estate upon which the facility is operated. (Emphasis Added.)

As we explained in our June 1999 response, this exemption is explicitly limited to owners who only have a real estate interest in the facility. In the Freedom Mine situation, the leased property does not constitute a separate facility but is part of the mining facility. And, Freedom Mine acknowledged this fact in its April 1999 letter. Since Freedom Mine is operating a mine, its interest in the facility as a whole is obviously more than a real estate interest, and thus the exemption provided for at 40 CFR section 372.38(e) does not apply.

Upon receipt of your May 2000 letter, we reviewed our regulations again and identified one other exemption that merits discussion. The other exemption that may be considered here is 40 CFR section 372.38(f), which reads:


Reporting by certain operators of establishments on leased property such as industrial parks. If two or more persons, who do not have any common corporate or business interest (including common ownership or control), operate separate establishments within a single facility, each such person shall treat the establishments it operates as a facility for purposes of this part (372). The determinations in sections 372.22 ("Covered facilities for toxic chemical release reporting") and 372.25 ("Thresholds for reporting") shall be made for those establishments. If any such operator determines that its establishment is a covered facility under section 372.22 and that a toxic chemical has been manufactured (including imported), processed, or otherwise used at the establishment in excess of an applicable threshold in section 372.25 for a calendar year, the operator shall submit a report in accordance with section 372.30 ("Reporting requirements and schedule for reporting") for the establishment. For purposes of this paragraph (f), a common corporate or business interest includes ownership, partnership, joint ventures, ownership of a controlling interest in one person by the other, or ownership of a controlling interest in both persons by a third person.

In order to apply this exemption to the mining facility, the mining facility should determine that there is no "common corporate or business interest (including common ownership or control)" between the mining facility and the farmers operating on mining facility land. Your letter stated that mining companies collect farmer reported crop yield data and forward it to regulatory authorities to demonstrate the productivity of the reclaimed land in order to receive bond release. The bond, according to your letter, is required by law. Based on these facts, there appears to be a common business interest between the mine and the farms in that the mine needs the farmers to productively farm the leased mining land in order for Freedom Mine to receive a bond release for having met its reclamation obligations.

We appreciate your concerns regarding requiring certain farming operations to report under TRI. If you believe there are other relevant facts that we should consider concerning Freedom Mine and its leased reclamation land, please contact us and we will review them. We plan to reexamine this issue more closely to determine if modifications to our regulatory program should be made to address specific farming operations such as those in the Freedom Mine case. Our goal is to continually improve the TRI program to ensure that it provides useful information for the public while at the same time looking for ways to minimize the burden on TRI reporters.

I hope this guidance is helpful to you in understanding the reporting requirements of section 313 of EPCRA. If you have any other questions, or desire further information, please call Larry Reisman, of my staff, at 202.260.2301.

Sincerely,

A handwritten signature in black ink, appearing to read "Maria J. Doa", with a horizontal line extending to the left and another to the right.

Maria J. Doa, Ph.D., Director
Toxics Release Inventory Program Division

cc: Mr. Joseph D. Friedlander, Freedom Mine